

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 591

FEDERAL POWER COMMISSION, PETITIONER

v.

TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY, AND UNITED FUEL GAS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM IN REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

This reply is for the sole purpose of restating and amplifying our view (Pet. 11) that a pipeline's obligation to pay interest on refunds cannot be regarded as an effective deterrent to excessive rate filings. Both Tennessee (Brief in Opp., pp. 19-22) and Manufacturers (Brief in Opp., pp. 13-14) argue that if such funds are used for capital expansion the effective interest rate on such capital is approximately 14 percent before taxes for a corporation in the 52 per-

(1)

cent tax bracket.¹ But, as Tennessee correctly states (Br. in Opp., p. 21), the interest rate after taxes on that portion of excess rate available for use as capital is approximately 7 percent. However, Tennessee is not correct in its conclusion that this 7 percent interest rate acts as a deterrent to filing for excessive increases because borrowing from other sources can be done at lower rates. The 7 percent cost of such capital is not properly to be compared with the cost of debt capital, since capital thus raised from the ratepayers can be treated as equity by the pipelines. The proper comparison is with the cost of equity money, which is in the neighborhood of 10 percent or more.² Moreover, by making the ratepayers provide equity capital, the common stockholders, trading on this equity, are enabled to obtain additional senior capital at less than the overall return earned by the company. The difference between the cost of senior capital and the overall return is, of course, income which increases the earnings per share of common stock. These earnings per share will, it is also clear, increase more rapidly if the number of shares of common stock entitled to the equity earnings remains

¹ It should be pointed out that on a corporation's current year's taxes there is a six-month's payment lag. The corporation has the free use, for a period equal to the period of collection of excessive rates, of approximately one half of a year's taxes, which materially reduces the 14% figure used by respondents.

² The 7% and 10% figures here compared correspond to 3 1/2% (see Petition, p. 12) and 5%, respectively, on the gross excess collected from the ratepayers.*

constant, instead of being increased by the issuance of new stock, while the plant and earnings are expanded.

Unwarranted rate increases make consumers involuntary lenders. We believe that the interim order is an important tool—one which should be used more, rather than less, frequently—in providing relief from this burden.

For the reasons stated in the petition and in this reply memorandum, we respectfully submit that the petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.

RALPH S. SPRITZER,
General Counsel,
Federal Power Commission.

JANUARY 1962.